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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 248

THE UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM F. MONIA AND L. AUBREY WILLIAMS,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

The statement of the case set forth in the brief of the Government (pp. 3-6) correctly and adequately states the facts. The Government's statement of the question presented (Br. p. 2), however, is incorrect, in that it includes the false issue of willingness or unwillingness of the witness to testify. See *infra*, pp. 5 to 7. The sole question involved in this case is: Must a witness who has been personally subpoenaed by the Government claim the constitutional privilege against self-incrimination in order to secure immunity from prosecution under the immunity provisions of the Sherman Act in addition to appearing before a grand jury pursuant to the subpoena and there testifying under oath substantially concerning matters on account of which he is subsequently indicted by the same grand jury?

SUMMARY OF ARGUMENT.

I.

The statute contains no words which could possibly bear a construction imposing upon a witness the obligation of claiming the privilege of silence under the Fifth Amendment to the Constitution. *Heike* v. *United States*, 227 U. S. 131, is distinguishable because the Court there construed the words of the statute. This Court should not incorporate in the statute the condition precedent sought by the Government, because the statute is clear and unambiguous and the statutory requirements of subpoena and oath preclude the incorporation of a further and additional condition.

The Government in its brief presents no judicial reason for imposing upon the witness compliance at his peril with an unexpressed condition precedent. The Government's contention if allowed makes of the statute a trap to ensnare the unwary. Its argument and that contained in its leading authority, *United States* v. *Skinner*, 218 Fed. 870, are based upon considerations of expediency wholly unsupported by the statute.

II.

The legislative history of the antitrust immunity statute shows that Congress did not intend to require a witness to claim privilege under the Fifth Amendment in order to obtain immunity from prosecution. The first immunity statute which later became Section 860 of the Revised Statutes did not require a claim of privilege as a condition precedent to the earning of immunity thereunder. This Court held that that statute did not deprive

a witness of the right to claim privilege if the witness desired to assert it. *Counselman* v. *Hitchcock*, 142 U. S. 547. Congress thereupon passed an act designed to deprive the witness of the constitutional privilege, which act this Court held accomplished that purpose because it operated to take out of the purview of the Fifth Amendment the class of persons who came within the definition of the statute and because it constituted a legislative grant of general amnesty to such persons. *Brown* v. *Walker*, 161 U. S. 591.

This Court likewise held that the first of the antitrust immunity acts, the Act of February 25, 1903, barred a witness from standing upon his constitutional privilege of silence. *Hale* v. *Henkel*, 201 U. S. 43. In *United States* v. *Armour and Company*, 142 Fed. 808 the Government contended that the 1903 Act required testimony under oath and pursuant to subpoena. The court held the act imposed no such conditions. The Government conceded and the court held that no claim of any kind was required of the witnesses.

In this setting and to give effect to the demands of the Government in the Armour case and to meet the consequences of that decision, Congress enacted the second of the antitrust immunity acts, the Act of June 30, 1906. The debates thereon show that Congress intended to impose upon the witnesses only the conditions expressly particularized in the statute.

The 1903 and 1906 Acts are hereinafter sometimes referred to as the antitrust immunity statute.

ARGUMENT.

The antitrust immunity statutes are:

> "* * * no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts (the Sherman Anti-trust Act and others): Provided further, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.[1]
>
> "* * * immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."[2]

The Government admits and the record shows that each of the appellees was personally subpoenaed by the Government and testified under oath before the grand jury in a substantial way concerning the matters for which each was subsequently indicted by the same grand jury. By so doing each complied fully with the express provisions of these acts and the Government nowhere in its brief contends otherwise. The burden of appellees' argument is that nothing more than compliance with the statute was required of them. The Government, on the other hand, contends that in the circumstances of record appellees should also have claimed the privilege under the Fifth Amendment. Instead of proving this contention anywhere the Government throughout its brief assumes without proof that appellees were under a legal requirement to assert a claim of privilege.

The Government argument falls into this error by posing demonstrably false and wholly arbitrary definitions

1. Act of February 25, 1903, 32 Stat. 854, 904, 15 U. S. C. 32.
2. Act of June 30, 1906, 34 Stat. 798, 15 U. S. C. 33.

of the terms, voluntary and involuntary testimony. The Government in its brief from beginning to end assumes or asserts that appellees testified voluntarily.

In the argument of the Government testimony is voluntary when a witness does not assert the constitutional privilege, and testimony is involuntary when a witness does assert his constitutional privilege and is thereafter required to testify. By so equating voluntary testimony to testimony given without assertion of the claim of privilege, the Government necessarily considers that testimony given in strict compliance with the express terms of the immunity statute under subpoena and oath can never be involuntary testimony. But as stated above the very question in issue is whether in the circumstances of record appellees were legally required to claim the privilege. The Government argument therefore begs the question in issue.

We also point out here that the Government attempts in its brief to bring in issue a matter which is not properly before the Court.

In its statement of the Question Presented (Br. p. 2), the Government seeks to have this Court hold that appellees should either (1) have claimed their constitutional privilege *or* (2) have indicated in some way *"an unwillingness to testify"*. In the argument (Br. p. 7) the same alternatives are used: "They [appellees] did not claim their privilege against self-incrimination; *and they never disclosed or indicated an unwillingness to testify*". Again the Government's brief at page 8 states the alternatives as maximum and minimum requirements. It is there asserted that the immunity statute "applies only when the witness claims his privilege *or at least indicates an unwillingness to testify* • • •"

Ready answers suggest themselves to this alternative of "unwillingness to testify". The more obvious of these answers are (1) the incongruity of the Government urging

contumacy on the part of a witness and the citizen suggesting that in the circumstances he is entitled to be forthright and candid; (2) the law never puts a premium on recalcitrance; (3) a "disclosure or indication of an unwillingness to testify" is not a legal requirement recognized either under the Fifth Amendment or under the immunity statute; and (4) the paradox of the Government insisting upon the necessity of an affirmative showing of recalcitrance in connection with a statute, the prime purpose of which was to obviate and overcome recalcitrance on the part of witnesses.

But prescinding from these valid answers we respectfully point out to the Court that this suggested standard of "unwillingness to testify" cannot be urged here. The record in this case fails to lend support to such a contention for the following reasons:

(1) The only language contained in either plea in any way relating to the willingness or unwillingness on the part of the witnesses to testify shows that each was "compelled" to testify (R. 9, 12). We make no point here as to whether such language constitutes an allegation of fact or a legal conclusion. With only general demurrers interposed to this language the Government is hardly in a position to make any dogmatic assertions in this Court as to whether the appellees were or were not willing witnesses.

(2) The only special ground urged by the Government in its general demurrers to the special pleas of appellees is:

> "Third: That said plea does not allege that the defendant L. Aubrey Williams[1] claimed the privilege against self-incrimination afforded by the fifth amendment to the Constitution of the United States, and consequently neither the fifth amendment to the Constitution of the United States nor section 32 of Title 15, U. S. C. A., commonly known as the immunity statute, has any application." (R. 13.)

1. Precisely the same grounds are urged against the plea of appellee Monia (R. 24).

The Government, having rested its case in the lower court solely upon the failure of appellees to allege in their pleas that they claimed privilege under the Fifth Amendment, may not now urge here for the first time that the pleas are defective for failure to allege that the appellees were "unwilling to testify." The Government should certainly not be permitted to take a position here other and different than that taken by it in the court below.

I.

The Antitrust Immunity Statute Does Not Require a Witness to Assert a Claim of Privilege Under the Fifth Amendment to the Constitution in Order to Earn Immunity from Prosecution.

The immunity provisions of the Sherman Act are singularly clear and unambiguous with respect to the conditions upon which immunity will be granted. The statute does not by its terms impose upon any witness the obligation of claiming the privilege against self-incrimination as a condition precedent to immunity and the statute contains no word or group of words which can possibly bear such a construction. The statute unqualifiedly prohibits the prosecution of a natural person who in obedience to a subpoena gives testimony under oath.

A. The Statute Is Clear and Unambiguous; It Contains No Words Which Can Be Construed to Require a Witness to Assert the Constitutional Privilege.

The first anti-trust immunity act, that of February 25, 1903, provides without any limitation whatsoever that no person shall be prosecuted on account of any transaction concerning which he may testify in any proceeding under the Sherman Act. There are clearly no words in the Act of 1903 susceptible of a construction imposing upon a

witness the requirement of claiming the privilege. The Government points out no such words in its brief.

The second act, that of June 30, 1906 is entitled "An Act Defining the right of immunity of witnesses under the Act entitled * * *" and provides that "immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath * * *" Again, in this act, no words can be or are pointed out by the Government which impose upon a witness the condition precedent intended for by it.

The absence from the statute of any words which could possibly bear a construction imposing upon a witness the condition of claiming his constitutional privilege of silence precludes any such construction. "* * * the plain obvious and rational meaning of a statute is always to be preferred to any curious, narrow or hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370. See also *Helvering* v. *San Joaquin Co.*, 297 U. S. 496; *Old Colony Railroad Co.* v. *Com'r*, 284 U. S. 552, 560; *United States* v. *Thind*, 261 U. S. 204. The principle is particularly applicable in the case at bar, of course, for this is not a "hard case." Each of appellees in strict compliance with the statutory requirements earned his amnesty by testifying in a substantial way to the matters charged in the indictment, which was the very result sought by the enactment of the statute.

The Act of June 30, 1906, is a clear and affirmative legislative definition of the persons entitled to the right and of the conditions under which such persons shall be entitled to immunity. The definition is threefold. The right shall extend only to (1) a natural person who (2) in obedience to a subpoena (3) gives testimony under oath. By such a precise and definite particularization of the limits of the

right, Congress clearly negatived the existence of any further or other limitations. *Expressio unius est exclusio alterius. Continental Casualty Co.* v. *United States*, 314 U. S. 527, 533.

The Government asks this Court to incorporate into the statute devoid of any expression of Congressional intention to that effect, a proviso in substance as follows:

> "Provided, that no person shall be entitled to immunity hereunder unless he shall, before testifying, state that he claims his privilege against self-incrimination."

Assuming, *arguendo*, that it could be demonstrated that Congress intended to include such a provision (the opposite is the case, see *infra*, pp. 18 to 25), this Court has repeatedly held that in the construction of statutory language "to supply omissions transcends the judicial function."

In *Iselin* v. *United States*, 270 U. S. 245, 250-251, this Court, through Mr. Justice Brandeis, stated with respect to a tax statute which the Government contended should be extended beyond its terms to effectuate Congressional intent:

> "* * * The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

See also to the same effect: *Wallace* v. *Cutten*, 298 U. S. 229, 237; *United States* v. *Weitzel*, 246 U. S. 533, 543.

The case of *Heike* v. *United States*, 227 U. S. 131, does not support the Government's position. In that case this Court denied a claim for amnesty because the evidence given by the witness was not incriminating. Such evidence, "neither led nor could have led to a discovery of

his crime." *Edwards* v. *United States*, 312 U. S. 473, 480. This Court arrived at the decision in the *Heike* case by interpreting the words of the immunity statute itself, and for the purpose of interpreting the statutory words, considered the Fifth Amendment as being in *pari materia*. We do not quarrel with the propriety of construing words and clauses as they exist in the statute with the Constitutional Amendment in mind. We do object, however, to incorporating into the statute a provision which is not indicated in any manner and which completely changes the meaning and the effect thereof. That this Court would not have gone that far had the issue been presented in the *Heike* case is indicated in the following statements of the opinion:

142 "• • • It [the immunity statute] should be construed, *so far as its words fairly allow the construction*, as coterminous with what otherwise would have been the privilege of the person concerned.

144 "• • • *When the statute speaks of testimony* concerning a matter it means concerning it in a substantial way just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." (Italics ours.)

Reference to prior acts or to constitutional provisions may not be made, of course, to interpret Congressional intention where the act under consideration is clear upon its face and standing alone is susceptible of but one construction. *Hamilton* v. *Rathbone*, 175 U. S. 414, 419. The immunity provisions of the Sherman Act are exceedingly clear respecting the conditions with which a witness must comply in order to secure immunity. Such provisions are not susceptible of the construction for which the Government contends, and therefore, recourse to extraneous aids to construction is unnecessary and improper.

The decisions of lower Federal courts are in conflict, as

stated in the Government's brief (pp. 17-26, 27). In *United States* v. *Goldman*, 28 F. (2d) 424 (D. C. D. Conn., 1928), the court held that a defendant was entitled to immunity under the applicable provisions of the Prohibition Act, which provisions were substantially the same as those here under consideration. The defendant there had not asserted his Constitutional privilege and had not claimed immunity. In rejecting the same contention as is made by the Government in the case at bar the court stated as pages 435-36:

> "The inquiry into legislative motives is often difficult and delicate, when the language of the statute is obscure. When the language is plain and unambiguous, courts hold no commission to alter it, to suit their conception of the motives which prompted the legislative will. If the plain wording of a statute does not really say what it was intended that it should say, then the place to reform the act is in the Congress, and not in the courts. But, were I minded, in this instance, to speculate on the legislative intent, I would say that Congress never intended to enact an equivocation; that it did not cunningly conceal within the body of the statute a proviso or limitation wholly undiscernible to the layman, and visible, if at all, only to the sophisticated vision of a legal casuist. Congress did not intend to construct a trap for the unlearned or unwary; nor did it intend that the meaning of some barren formula should be the prerequisite of admission to grace in exchange for something done. If amnesty were to be available only to those who protested, it would have been a simple matter for the Congress to have added to section 30 the following language:
>
> " 'But no person shall be entitled to the benefits hereof unless he shall, before testifying, declare to the court his refusal to testify on the ground of self-incrimination.' "

In *United States* v. *Pardue*, 294 Fed. 543 (D. C. S. D., Texas, 1923), which involved the immunity provisions of Section 9 of the Federal Trade Commission Act, Judge Hutcheson rendered an equally strong opinion in overruling

the Government's demurrer to a plea in bar. The court's opinion there is quoted in part in appellant's brief (pp. 25-26). The same view was taken by the courts in *United States* v. *Ward*, 295 Fed. 576 (D. C. W. D., Wash., 1924), and *United States* v. *Moore*, 15 F. (2d) 593 (D. C. D., Ore., 1926).

B. The Statute Prohibits the Prosecution of a Natural Person Who in Obedience to a Subpoena Gives Testimony Under Oath.

Under the immunity statute the witness's amnesty is an immunity from prosecution. It is because of the fact that all prosecutors are prohibited from prosecuting that the witness is said to have "absolute immunity."

The Government in effect argues (Br. pp. 35-36—and the same fallacious argument is made in the Government's principal authority, *United States* v. *Skinner*, 218 Fed. 870 (S. D. N. Y., 1914) contrary to the plain words of the statute, that the statute contains a delegation to the particular prosecutor interrogating the witness of the *right* to "grant" or "withhold" immunity at will rather than an imperious unqualified mandate upon prosecutors—all prosecutors—not to prosecute the witness under the circumstances stated.

Upon this false premise the District Court in the *Skinner* case and the Government in its brief contend paradoxically that the immunity statute has converted the constitutional option of silence on the part of the citizen into (1) an option in favor of the particular prosecutor asking the questions to elect whether he will allow the immunity statute to operate, plus (2) a duty on the part of the witness to inform the prosecutor asking the questions whether or not the witness is seeking to have the immunity statute operate.

In order that there shall be no doubt that we are correct in this statement we refer the Court to pages 21, 22 and

35-37 of the Government's brief. The exact words of Judge Grubb in this connection appear as follows (Br. p. 21):

> "• • • The government is itself clothed with an option which cannot be intelligently exercised until there has been an assertion of privilege by the witness. It is entitled to know whether immunity will follow from the examination of the witness. It has the option to receive the testimony and thereby grant the immunity, or to reject the testimony and deny the immunity. • • •"

Following this piece of casuistry wholly unsupported by authority the Government asserts (Br. p. 35):

> "• • • the Government prosecutor proceeds at the constant risk of unintentionally giving immunity. Not knowing whether the answer will incriminate the witness, he cannot exercise any judgment as to whether immunity should be given in exchange for the testimony or whether it would be preferable to lose the testimony and retain the right to prosecute the witness for his crime, if evidence showing his participation should be obtained from other sources. At the moment the answer is given the prosecutor would unwittingly have given immunity. • • •"

The answer to these considerations of expediency [and to all of the others asserted by the Government in its brief in the pages cited] is found in the fact that the statute on its face does not give to the inquiring prosecutor any such veto entitling him to "grant" or "withhold" immunity from the witness. So far as the plain words of the statute are concerned, the inquiring prosecutor and all other prosecutors derive therefrom nothing but a positive and clear mandate not to prosecute the witness in the circumstances enumerated. The Government in its argument is merely complaining about the consequences of the absolute immunity from prosecution earned by the witness upon his compliance with its provisions.

The potential prosecutors of collateral crimes disclosed by a witness's testimony cannot prosecute the

witness for such crimes for the simple and sufficient reason that the statute says that he may not be prosecuted and not because a particular prosecutor "elected" to "grant" the witness immunity for the collateral crimes of which the inquiring prosecutor may not even have known until the answer of the witness was elicited and in which he may have had no interest. See *United States* v. *Molasky*, 118 F. (2d) 128, 133-137, C. C. A. 7, 1941.

The prosecutor asking the questions is likewise barred from prosecuting the witness for the crime under investigation for exactly the same reason—such prosecution is barred by the statute. The immunity of the witness is there earned by his giving the testimony under the conditions stated in the statute—and the activities of the questioning prosecutor have no other or different consequences in respect of the matter under investigation than they have in the case of collateral crimes disclosed by the testimony.

Not only does the *Skinner* case clothe the inquiring prosecutor with this option but it also imposes upon the witness an even more tenuous "option," stated by Judge Grubb as follows:

> "The witness is clothed with an option to testify without asserting his privilege, in which event his testimony is voluntary, and entitles him to no immunity, or to testify only after the assertion of his privilege, and after its denial to him, in which event the evidence given by him is compulsory and entitles him to immunity. The government is entitled to know which option the witness selects." (218 Fed. 870, 878.)

Of course Judge Grubb could have reached this conclusion only by assuming the legal necessity of asserting the claim of constitutional privilege—which was the very question in issue.

We assert flatly that what Judge Grubb leaves to the witness here is no option at all but an obvious trap to

ensnare him. It must be a trap unless all witnesses are to be held possessed of legal competence sufficient to enable them to uniformly and correctly decide the very legal question presented to this Court in the case at bar. The record in this case shows affirmatively that appellees had no such legal competence (R. 10).

Under the Fifth Amendment the witness's option is to testify or to remain silent. The statute in question destroyed that option by requiring disclosure and forbidding silence. As a substitute for this historical and fundamental option Judge Grubb in that opinion and the Government here cut out of whole cloth and without citation of authority a so-called option under which the witness is relegated to a choice—which is no choice—either to testify or to testify. Presumably under the "coextensiveness" theory of the Government this pseudo-option is coextensive with the constitutional option of the witness either to testify or to remain silent—a conclusion with which witnesses will not readily agree.

And as though there were not sufficient sophistries already in the opinion, Judge Grubb says:

> "If the witness fails to assert his privilege, the Government would have the right to assume that immunity was not desired by him, and that permitting him to testify would not be attended with that result."

Such an assumption, adopted by the Government throughout its argument (Br. p. 22), could obviously be made only if the witness in failing to assert his privilege was under a legal duty to assert it. But that was the precise question in issue in the *Skinner* case, and is the precise issue here—and Judge Grubb there, and the Government here, assume as a fact the existence of such a duty. As a corollary Judge Grubb must have assumed as a fact the co-existence of a legal duty on the part of the witness not to rely on the express provisions of the statute.

The assumptions indulged by Judge Grubb and urged

by the Government here are based upon the further assumption that Congress intended by this statute to trap all forthright witnesses who, not intending to waive any of their rights, constitutional or statutory, give testimony in strict accordance with the express provisions of the statute and in a *bona fide* belief that by so testifying they will earn the absolute immunity proffered by the very words of the statute. We think no citation of authorities is needed in support of our view that such an intent cannot be imputed to Congress.

The final and complete answer to these question-begging assumptions of the court in the *Skinner* case is found in the fact that this Court indulged precisely the opposite presumption in the case of *Cameron* v. *United States*, 231 U. S. 710, 720. In that case testimony shielded by the limited immunity provisions of Section 860 was presumed by this Court to have been given by the witness in reliance upon that statute. That same assumption must necessarily be made in the case at bar, and for the reasons given, the *Skinner* case, which is the Government's leading authority, stands discredited and should not be followed by this Court.

Judge Hutcheson in *United States* v. *Pardue*, 294 Fed. 543, a soundly reasoned opinion on the precise question here in issue made the following searching observations on the *Skinner* opinion (p. 546):

> "Judge Grubb, in the *Skinner* case, stands alone in the position which he there takes. While his opinion presents a splendid argument against the wisdom of the immunity statutes as they now are, and a good suggestion to the legislative authorities for an amendment of them, it presents, in my opinion, no judicial ground for refusing to apply the statute as written. It by judicial interpretation writes into a statute in derogation of a constitutional right a limitation not therein contained, and which the ordinary mind, to which the statute is addressed, could not have supposed was contained in it. It to an extent follows the

Draconian principle of writing the law in characters so fine that no one can read it, and thereby putting the government in a better position to take the unwary ones into its net. It magnifies the fault of the defendant, while it minimizes the bad faith of the government. It puts the seal of condemnation upon the offense against the general laws of which the defendant is charged, but it approves double dealing and evasion on the part of the government in the matter of a man's constitutional protection, which right reason and sound discrimination cannot, in my opinion, sustain."

In the light of the foregoing we think it unnecessary to comment upon the cases following the *Skinner* decision and set forth in the Government's brief, page 23. We point out, however, that in the last case decided in the Southern District of New York, *United States* v. *Greater New York Live Poultry Chamber of Commerce*, 33 F. (2d) 1005, 1006 (1929), the Court, through Judge Augustus Hand, made the following comment upon the necessity of defendants claiming their privilege of silence in order to obtain immunity:

"* * * Upon the words of the statute the argument is with the contention now advanced by the defendants, whose pleas are before me. *United States* v. *Pardue* (D. C.) 294 F. 543; *United States* v. *Goldman* (D. C.) 28 F. (2d) 424. These words, however, by repeated judicial construction within this district, have been so limited as to require me to sustain the government's demurrers."

The realistic fact of the matter is that this statute gives the Government, and on its face was intended to give the Government, nothing but a positive mandate, not to prosecute individuals who come within its expressly limited terms. The only rights and duties springing from the statute are the right of the citizen who has had his constitutional privilege peremptorily taken away by the statute to be forever immune from all prosecution for all

matters substantially testified to by him provided he has testified under oath pursuant to Government subpoena, and the only duty on the part of the Government is to see to it that that right of the citizen is protected and respected. In the case at bar by including these two appellees among the defendants in the indictment, after calling them as its witnesses, the Government failed in that duty and now urges upon this Court a recognition of a "duty" on the part of these appellees towards the Government and discourses upon its "rights" and its "option"—as though the rights and duties under the statute were not in exact opposition to the Government's contentions.

II.

The Legislative History of the Antitrust Immunity Statute Shows That Congress Did Not Intend to Require a Witness to Claim the Constitutional Privilege Against Self-Incrimination in Order to Obtain Immunity From Prosecution.

Since the statute is clear and unambiguous, no construction or interpretation of its provisions is necessary or permissible for the reasons above set forth. If, however, this Court should consider the statute to be ambiguous, the prior, and contemporaneous legislative history of the statute shows clearly that Congress did not intend to impose upon a witness the obligation of claiming the constitutional privilege of silence as a condition precedent to the earning of immunity.

A. Section 860 of the Revised Statutes Did Not Require a Witness to Claim His Constitutional Privilege as a Condition Precedent to the Earning of Immunity.

The first immunity statute relating to judicial proceedings was the Act of February 25, 1868, 15 Stat. 37. This statute later became Section 860 of the Revised Statutes, and provided as follows:

> "* * * That no answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness: *Provided*, That nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovering or testifying as aforesaid."

As stated in the Government's brief (p. 9): "This Act applied generally to all judicial proceedings and provided in effect that no evidence obtained from a witness would subsequently be used against him in a criminal proceeding." Section 860 was in full force and effect in 1903 and 1906 and was not repealed until 1910.[4]

In the case of *Tucker* v. *U. S.*, 151 U. S. 164, this Court held that the compulsion necessary to earn a witness immunity under Section 860 was the compulsion of a "subpoena, interrogatory or other judicial process," and that the absence of these requirements rendered testimony voluntary. At page 168 this Court said:

> "'Discovery or evidence obtained from a party or witness by means of a judicial proceeding' includes only facts or papers which the party or witness is

4. Act of May 7, 1910, c. 216, 36 Stat. 352.

compelled by subpoena, interrogatory, or other judicial process to disclose, whether he will or not; and is inapplicable to testimony voluntarily given, or to documents voluntarily produced."

This case was followed in *Hammond Lumber Co.* v. *Sailors' Union of the Pacific*, 167 Fed. 809 (C. C. N. D., Cal., 1909), where the Court had under consideration the question whether the witness was required to claim his constitutional privilege to earn the immunity afforded by Section 860. In holding that such claim need not be asserted the Court said at p. 824:

> "Of course, the statute would not protect one against a discovery made or evidence given voluntarily, and without necessity; but here the evidence was obtained in obedience to a subpoena, requiring the witness to attend and testify, and the evidence given under such circumstances cannot be said to have been given voluntarily, within the meaning of such a statute; and this I take to be the effect of *Tucker* v. *United States*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112."

Mr. Justice Holmes sitting as Circuit Justice for the Circuit Court of Appeals, First Circuit, held in *Johnson* v. *U. S.* (163 Fed. 30, 1908) that bankruptcy schedules filed by the bankrupt, whether in a voluntary or involuntary proceeding were protected by Section 860 and could not be used against the bankrupt in the Government's criminal prosecution of him for concealing assets from the trustee.

Similarly this Court in the case of *Cameron* v. *U. S.*, 231 U. S. 710, held that the use of testimony given by the bankrupt in his bankruptcy proceedings violated the immunity guaranteed under Section 860 and constituted reversible error.

The conclusion is inescapable that no claim of privilege was required of a witness in order to earn the immunity afforded by Section 860 and it is equally clear that such immunity to the extent granted was earned by the witness upon compliance with the statutory provisions.

The Government itself in the *Counselman* Case took the position that Section 860 required no claim of privilege since the section excluded the subsequent use of both voluntary and involuntary admissions of a witness. The following attitude of the Government appears at page 555 of the Counselman report (142 U. S.):

> "This section is taken from the act of February 25, 1868, 15 Stat. 37, c. 13, entitled 'An Act for the Protection in certain Cases of Persons making Disclosures as Parties, or testifying as Witnesses.' Before its passage voluntary admissions were always admissible in evidence against an accused. The Fifth Amendment sought only to preclude the use of involuntary testimony, while the act in terms excludes both voluntary and involuntary admissions. Thus, instead of invading, it adds to the guaranties of the Constitution, and is a new safeguard for individual rights and liberties."

As stated in the Government's brief (pp. 10-11), this Court in *Counselman* v. *Hitchcock*, 142 U. S. 547, held that Section 860 did not deprive the witness of his constitutional privilege since, for the reasons there stated, the statute did not afford the witness absolute immunity from subsequent prosecution. This Court did not, as stated in the Government's brief, hold the statute unconstitutional. Following the *Counselman* decision, the witness clearly had the option of either claiming his constitutional privilege of silence and not testifying or of testifying and thereby obtaining immunity under Section 860.

B. The Antitrust Immunity Act of February 25, 1903, Did Not Require a Witness to Claim His Constitutional Privilege as a Condition Precedent to the Earning of Immunity.

Following the decision of this Court in the *Counselman* case, Congress passed the Act of February 11, 1893, 27 Stat. 443 (49 U. S. C. 46), providing for immunity under proceed-

ings conducted under the Interstate Commerce Act. As stated in the Government's brief, the Congressional purpose of that Act was to meet the objection raised by this Court in the *Counselman* case. The purpose, therefore, must have been to compel the giving of testimony since, as stated above, the decision in the *Counselman* case still left the witness with the option of giving or refusing to give testimony. That such was the Congressional purpose was recognized by this Court in *Brown* v. *Walker*, 160 U. S. 591, where this Court held that a witness confronted with the immunity provisions of the Interstate Commerce Act could not refuse to testify. This Court held (pages 601-602) that those provisions removed from the purview of the self-incrimination clause of the Fifth Amendment the class of persons within the terms of the statute, and in effect constituted a legislative grant of general amnesty to such persons.

In February, 1903, the first of the immunity acts in issue in the case at bar was passed. Shortly thereafter, in the case of *Hale* v. *Henkel*, 201 U. S. 43, this Court was asked to determine whether under that act, in an anti-trust investigation, a witness could stand upon his constitutional privilege of silence, or whether he must answer. Referring to the decision in the *Brown* case, this Court held that the witness must testify, because the act afforded (page 67) "absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer."

In the same year as the *Hale* decision, the court in *United States* v. *Armour and Company*, 142 Fed. 808 (D. C. N. D., Ill., 1906), considered the conditions essential to the earning of immunity under the Act of February 25, 1903. The Government there argued that the compulsion necessary was the "compulsion furnished by the subpoena and oath" (p. 824). The Court there reached three conclusions: (1) Witnesses were immune from prosecution, even though

they had not testified pursuant to subpoena; (2) witnesses were immune from prosecution even though they testified without the sanction of an oath; and (3) immunity flowed to witnesses by force of the statute itself and without the necessity of any claim therefor by the witnesses.

The Armour opinion discloses that the Department of Justice contended that the witnesses should have resisted the Government officer and thereby have compelled him to issue subpoenas and to place them under oath. The opinion further discloses that the Department of Justice, on the hearing, conceded that the witnesses were not required to make any claim to entitle them to immunity from prosecution. In this connection the court said:

> "If I am right in saying that immunity flows from the law without any claim on the part of the defendant —*and at different times that has been conceded here in argument*—then no act of any kind on his part which amounts to a claim of immunity, which amounts to setting up a claim of immunity, is demanded by the law. The law never puts a premium on contumacy." (Italics ours.)

C. The Congressional Debates on the Act of June 30, 1906, Conclusively Show That Congress Did Not Intend to Impose the Requirement of a Claim of Constitutional Privilege as a Condition Precedent to the Earning of Immunity.

The executive and legislative branches of the Government immediately took cognizance of the *Armour* decision. The President of the United States, in a message to Congress,[5] stated that it had

> "• • • been supposed that the immunity conferred by existing laws was only upon persons who, being subpoenaed, had given testimony or produced evidence as witnesses • • •"

5. 40 Cong. Rec. 5500 (1906).

He recommended that Congress pass a declaratory act stating its real intention. Accordingly bills were introduced in each house resulting in the Act of June 30, 1906. The Congressional debates on these bills show beyond argument that

1. The bill substantially as passed was prepared by the Department of Justice itself;

2. The purpose of the bill, and its only purpose, was to establish definite standards under which immunity would be granted witnesses; and

3. The standard set forth was the taking of incriminating testimony of a natural person, under oath and pursuant to subpoena.

Senator Knox, the sponsor of the Senate bill, commented in part as follows as to the benefits to be derived from the bill:

"Mr. President, the whole purpose of this bill is to define the right of the witness as we thought it was defined in the statute which I have read, and to say, as the statute said, but to say it even more clearly and emphatically, that the immunity shall only extend to witnesses who have been subpoenaed to produce books and papers or subpoenaed to give testimony."[6]

Mr. Littlefield, sponsor of the bill in the House, similarly commented in part as follows:

"* * * Of course, if they make an inquiry, and the party inquired of does not see fit to testify unless he is formally summoned and gives testimony on oath, it would establish a legal standard that would protect him and place the Government in a position where they would know what they were doing. * * *[7]

* * * * *

"* * * And the purpose of this legislation is simply to have a definite record, so that the Government may know when it is giving immunity and so that the party who is getting immunity may know when he is entitled to it."[8]

6. 40 Cong. Rec. 7657-58 (1906).
7. 40 Cong. Rec. 8738-39 (1906).
8. 40 Cong. Rec. 8740 (1906).

Further extracts from the debates on these bills are set forth in an appendix hereto attached. The Congressional Record discloses that no member of Congress in discussing these bills even mentioned the necessity of a claim of privilege as a condition precedent to the earning of immunity.

As shown both in the contemporaneous judicial and legislative history of the Act of June 30, 1906, the President of the United States, the Department of Justice, the Interstate Commerce Commission and both houses of Congress apparently believed that the decision of the Court in the *Armour* case left the Act of February 25, 1903, in such a way that neither the Government nor the witness could thereafter determine precisely when that section applied and when it did not apply. The demand of the President and of the Attorney General was for objective, specific standards—measuring rods by which for all time both the witness and the Government could promptly determine when the witness would be immune from prosecution and when he would not be immune.

The standards sought were, of course, standards for determining precisely what testimony should be considered voluntary and therefore not within the purview of the statute and what testimony should be considered compulsory and hence within the scope of the statute. In response to this demand Congress enacted the Act of June 30, 1906, which expressly extends the right of immunity only to natural persons who testify under oath pursuant to subpoena.

In the face of the establishment by Congress of these express standards of compulsion the Government asserts and asks this Court to hold that there is another unexpressed hidden standard without which the statute cannot operate.

The Government throughout its brief places emphasis upon the admitted necessity of a claim of privilege on the

part of a witness under the Fifth Amendment and upon the requirement of such a claim expressly appearing in the immunity provisions to be found in some recently enacted statutes administered by various governmental agencies (Br. 28). The claimed effect of this argument is that Congress in 1906 must be held to have been then legislating having in mind the necessity of the assertion of such a claim under the Constitution,—a hypothesis which it is claimed is supported by the form of these several immunity provisions enacted thirty years later.

This method of argument has been questioned by this Court: "Suggestive as this analysis is, it is entitled to little weight. No mere collation of other statutes can be decisive in determining what the instant statute means. The meaning of each must be closely related to the time and circumstance of its use." *United States* v. *Stewart*, 311 U. S. 60, 69, and see also *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349.

The foregoing observation is particularly applicable to a collation of immunity provisions found in statutes administered by governmental agencies because of the wide differences, procedural and otherwise, existing in such statutes. It is pertinent, however, to suggest that there is no uniform immunity statute. Without attempting to enumerate the many differences in immunity statutes, a cursory examination of them will disclose that such statutes differ widely in respect of the persons before whom and the forum in which the testimony shall be given. In some statutes the requirement of a subpoena is explicit, while in other this requirement is not expressed,[9] and in one statute at least the requirement is "in obedience to the subpoena or lawful requirement of the Commission."[10] Like variations

9. Federal Trade Commission Act, September 26, 1914, 38 Stat. 722, 15 U. S. C. 49; Securities Act, May 27, 1933, 48 Stat. 86, 15 U. S. C. 77v(c).

10. Federal Communications Act, June 19, 1934, 48 Stat. 1096, 47 U. S. C. 409(j).

appear in respect of the requirement of testifying under oath.

It is therefore impossible to derive any general conclusions from these variegated immunity statutes having application to entirely diverse administrative situations. The argument of the Government adds nothing to the picture except to indicate one difference among many others which Congress has seen fit to provide. However valid an argument may be in pointing out language differences in statutes to demonstrate a divergence of statutory meaning, logic and authority rebel against pointing out differences to prove identity of meaning.

Conclusion.

For the above reasons it is respectfully submitted that the judgment of the Court below was correct and should be affirmed.

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APPENDIX.

In the Senate, in response to a request for "some statement as to the present state of the law and as to the benefits to be derived from the bill," Senator Knox, replied in part as follows:

> "Mr. Knox. Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself. Senators are fully aware that under the interstate-commerce act and under the act creating the Department of Commerce and Labor, the Interstate Commerce Commission, in the first instance, and the Commissioner of Corporations, in the second instance, are authorized by the law to compel witnesses to appear before the Commission and the Commissioner, respectively, to disclose their books and papers, and to give evidence in relation to transportation companies and concerns engaged in interstate commerce whether or not the testimony which they disclose incriminates them. In order that that law might be made effectual under the Constitution the statute gave witnesses so appearing and testifying or producing books and papers *complete immunity* from prosecution by reason of anything that they might disclose or because of any of the transactions with which their testimony might be concerned."[1] (Italics ours.)

Senator Knox then reviewed the history of the immunity statutes. He stated that it had been assumed that under such statutes it was essential that a subpoena should be issued, and continued:

> "* * * but it so turned out that in the prosecution of the great beef trust in Chicago, Commissioner Garfield had had some conversations with different members of the beef trust, and some of them had produced books and papers voluntarily or at his request, and,

1. 40 Cong. Rec. 7658 (1906).

notwithstanding the language that the immunity provision was only to extend persons 'subpoenaed' to give testimony and 'subpoenaed' to produce books and papers, the court in Chicago held that they had obtained the immunity by voluntarily disclosing the secrets of their business to Commissioner Garfield.

"Mr. President, the whole purpose of this bill is to define the right of the witness as we thought it was defined in the statute which I have read, and to say, as the statute said, but to say it even more clearly and emphatically, that the immunity shall only extend to witnesses who have been subpoenaed to produce books and papers or subpoenaed to give testimony." (Italics ours.)

Similar discussion ensued in the House. In response to a request for explanation of the bill, Mr. Littlefield stated (p. 8738):

"Mr. Littlefield. The Senate bill is a draft made by the Department of Justice for the purpose of establishing a definite standard under which immunity will be granted witnesses * * *."[2]

Mr. Littlefield was then asked how the Government can obtain information before prosecution, if the employees of a company may refuse to produce books for examination unless given immunity, and if the law provides that nobody shall have immunity unless called as a witness. Mr. Littlefield thereupon replied (pp. 8738-39):

"Mr. Littlefield. There is no trouble at all, so far as the Interstate Commerce Commission is concerned, or the Department of Commerce and Labor, or the Commissioner of Corporations. Each of them has power to summon witnesses, although no case is pending. They have the power under the statute to compel the attendance of witnesses. *Of course, if they make an inquiry, and the party inquired of does not see fit to testify unless he is formally summoned and gives testimony on oath, it would establish a legal standard that would protect him and place the Government in a position where they would know what they were do-*

2. 40 Cong. Rec. 8738 (1906).

ing. He would have a perfect right to insist on that formality being observed. Now, the Attorney-General is of the opinion that under the existing conditions immunity is granted under a great many circumstances when neither party perhaps expected any such result to follow. I make no criticism whatever upon the decision of the judge in Chicago, *but the Attorney-General is very firmly of the opinion that the Department of Justice is bound to be very seriously embarrassed in the enforcement of this legislation unless this definite and specific standard is established by Congress.*

* * * * *

"Now, I can see no practical difficulty. The Attorney-General sees none. The Interstate Commerce Commission, as I understand it, does not apprehend any, and the Commissioner of Corporations does not apprehend any, *provided we have this definite legal standard, so that the Government shall know when it confers immunity, and so that the people who give this testimony or appear in court or produce written evidence shall know when they are entitled to immunity.* Under existing conditions it is a very uncertain and doubtful proposition."[3] (Italics ours.)

In concluding the debates, Mr. Littlefield makes the following extremely pertinent remarks (p. 8740):

"Mr. Littlefield. *And the purpose of this legislation is simply to have a definite record, so that the Government may know when it is giving immunity and so that the party who is getting immunity may know when he is entitled to it.* It never ought to be left to the infirmity, to put it no stronger, of the human recollection as to whether a man is or is not entitled to immunity, or whether he has or has not made a statement that bars the Government from prosecuting him for the commission of a crime. The Department of Justice insists that unless they can have this definite standard, the administration of the criminal law is substantially and dangerously embarrassed, and may in many instances be absolutely defeated."[4] (Italics ours.)

3. 40 Cong. Rec. 8738-39 (1906).
4. 40 Cong. Rec. 8740 (1906).

SUPREME COURT OF THE UNITED STATES.

No. 248.—October Term, 1942.

The United States of America, Appellant, vs. William F. Monia and L. Aubrey Williams.	Appeal from the United States District Court for the Northern District of Illinois.

[January 11, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

This is a direct appeal from the District Court for Northern Illinois prosecuted pursuant to the Criminal Appeals Act.[1] It presents a question upon which the lower federal courts have sharply divided.[2] The question is whether one who, in obedience to a subpoena, appears before a grand jury inquiring into an alleged violation of the Sherman Act, and gives testimony under oath substantially touching the alleged offense, obtains immunity from prosecution for that offense, pursuant to the terms of the Sherman Act, although he does not claim his privilege against self-incrimination.

The Sherman Act[3] provides in part:

". . . no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Anti-trust Act, and other acts]; *Provided further*, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

That statute was supplemented by the Act of June 30, 1906,[4] which, so far as material, is

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[1] Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. [illegible], 18 U. S. C. 682.

[2] Compare United States v. Armour & Co., 142 Fed. 808; United States v. Skinner, 218 Fed. 870; United States v. Elton, 222 Fed. 428; United States v. Lee, 290 Fed. 517; Johnson v. United States, 5 F. 2d 471; United States v. Lay Fish Co., 13 F. 2d 136; United States v. Greater New York Live Poultry C. of C., 33 F. 2d 1005, with United States v. Pardue, 294 Fed. 543; United States v. Ward, 295 Fed. 576; United States v. Moore, 15 F. 2d 593; United States v. Goldman, 28 F. 2d 424.

[3] Act of February 25, 1903, 32 Stat. 854, 904, 15 U. S. C. 32.

[4] 34 Stat. 798, 15 U. S. C. 33.

". . . under the immunity provisions [of the above Act and others] immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

An indictment was returned charging corporations and individuals, including the two appellees, with conspiracy to fix prices in violation of the Sherman Act. The appellees filed special pleas in bar, each alleging that, in obedience to a subpoena duly served, he appeared as a witness for the United States before the grand jury inquiring respecting the matters charged in the indictment, and gave testimony substantially connected with the transactions covered by the indictment. No question is made but that the testimony so given did substantially relate to the transactions which were the subject of the indictment.

The United States demurred to the pleas as insufficient, since neither alleged that the witness asserted any claim of privilege against self-incrimination and therefore neither the Fifth Amendment of the Constitution nor the immunity statute could avail him.

The District Court overruled the demurrers on the ground that the plain mandate of the statute precluded prosecution of the appellees whether they had claimed the privilege or not. We hold that the decision was right.

Beyond dispute the appellees were entitled to immunity from prosecution if the statute is to be given effect as it is written. We are asked, however, to read into it a qualification to the effect that immunity is not obtained unless the privilege against self-incrimination is claimed. Inasmuch as the statute is addressed to this privilege, and the privilege is accorded by the Fifth Amendment, it is said that if immunity is offered as a substitute for the privilege, the immunity, like the privilege, ought to be claimed; that thus the statute and the Fifth Amendment, which are *pari materia*, will be given a consistent construction.

In the second place, it is urged that qualification of the forthright terms of the statute is necessary in order to avoid an unreasonable, unfair, and unintended result. The argument runs that if the statute is construed automatically to grant immunity without a claim of privilege, the prosecutor is at a disadvantage since he does not know whether, or to what extent, a witness may have participated in a crime; and so runs the risk of unintentionally affording immunity. On the other hand, so it is said, the

witness has full knowledge as to the nature of his own conduct, and as to his possible incrimination by testimony, and it is not unfair to require him to claim his privilege and so put the prosecutor on notice that, if he insists upon the testimony, the witness will obtain immunity.

The well understood course of legislation before and after the adoption of the statute involved, and the legislative history, compel rejection of the contentions.

The Fifth Amendment declares that "No person . . . shall be compelled in any criminal case to be a witness against himself." An investigation by a grand jury is a criminal case.[5] The amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.[6]

More than seventy years ago Congress was advised that, in suits prosecuted by the United States, where evidence had been sought from certain persons, to be used by the Government, they had interposed a claim of privilege which had been sustained by the courts.[7] In order to forestall the obstruction and delay incident to judicial determination of the validity of the witness' claim, and in order to obtain necessary evidence, even though the claim were well founded, Congress adopted the Act of February 25, 1868,[8] which became R. S. 860. This Act applied to all judicial proceedings and provided, in effect, that no evidence obtained from a witness could be used against him in a criminal proceeding.

This court, in *Counselman* v. *Hitchcock*, 142 U. S. 547, held the Act unconstitutional because, while it prevented the use of the evidence against the witness, it did not preclude his prosecution as a result of information gained from his testimony. The court indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege.

The original Interstate Commerce Act[9] contained an immunity provision in the form held invalid in the *Counselman* case. To meet the decision in that case, Congress passed the Act of February

[5] Counselman *v.* Hitchcock, 142 U. S. 547, 562.

[6] United States *ex rel.* Vajtauer *v.* Commissioner, 273 U. S. 103, 113.

[7] Cong. Globe, 40th Cong., 2d Sess., pp. 950-51, 1774.

[8] 15 Stat. 37.

[9] 24 Stat. 383.

11, 1893,[10] which applied only to proceedings under the Interstate Commerce Act. This statute, however, became the model for immunity provisions which were enacted at various times up to 1933, including the Act of February 25, 1903, *supra*, with which we are here concerned. This court sustained the constitutionality of these Acts.[11]

In 1906 the District Court for the Northern District of Illinois held, in *United States* v. *Armour & Co.*, 142 Fed. 808, that a voluntary appearance, and the furnishing of testimony and information without subpoena, operated to confer immunity from prosecution under the Sherman Act. The court held that the immunity conferred was broader than the privilege given by the Fifth Amendment. The decision attracted public interest since, if it stood, one could immunize himself from prosecution by volunteering information to investigatory bodies. Congress promptly adopted the Act of June 30, 1906, *supra*, providing that the immunity should only extend to a natural person who, in obedience to a subpoena, testified or produced evidence under oath. The Congressional Record shows that the sole purpose of the bill was exactly what its language states.[12] Senator Knox, who sponsored the bill, stated: "Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself."

It is evident that Congress, by the earlier legislation, had opened the door to a practice whereby the Government might be trapped into conferring unintended immunity by witnesses volunteering to testify. The amendment was thought, as the Congressional Record demonstrates, to be sufficient to protect the Government's interests by preventing immunity unless the prosecuting officer, or other Government official concerned, should compel the witness' attendance by subpoena and have him sworn.

Not until 1933 did Congress evidence an intent that if the witness desired immunity he must, in addition, assert his constitutional privilege. In a series of acts adopted between 1934 and 1940 an additional provision was inserted adding this requirement.[13] These acts indicate how simple it would have been to add a similar pro-

[10] 27 Stat. 443, 49 U. S. C. 46.

[11] Brown v. Walker, 161 U. S. 591.

[12] 40 Cong. Rec. 5500, 7657-58, 8734-39-40.

[13] See e. g. Securities Exchange Act, 48 Stat. 906, 15 U. S. C. 78u(d); Investment Advisers Act, 54 Stat. 853, 15 U. S. C. 80b-9(d).

vision applicable to the Interstate Commerce Act, the Sherman Act, and others which have been allowed to stand as originally enacted save for the amending Act of 1906.[14]

The legislation involved in the instant case is plain in its terms and, on its face, means to the layman that if he is subpoenaed, and sworn, and testifies, he is to have immunity. Instead of being a trap for the Government, as was the original Act, the statutes in question, if interpreted as the Government now desires, may well be a trap for the witness. Congress evidently intended to afford Government officials the choice of subpoenaing a witness and putting him under oath, with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by foregoing the opportunity to examine him. That Congress did not intend, or by the statutes in issue provide, that, in addition, the witness must claim his privilege, seems clear. It is not for us to add to the legislation what Congress pretermitted.

We have referred to the diversity of views amongst the lower courts. The Government insists that this court has settled the question in favor of its view. Its reliance is upon *Heike* v. *United States*, 227 U. S. 131. That case, however, decided only that the immunity conferred by the legislation in question was intended to protect the witness to the same extent that the Fifth Amendment protects him. The question was whether the immunity extended to prosecution for crimes with which the matters testified to were but remotely connected. This court held that, as the Amendment did not justify a claim of privilege against such remote contingencies, the immunity should be likewise construed not to reach them. The question of the necessity of a witness before an investigatory body claiming his privilege in order to earn his immunity was not decided.

The judgment is affirmed.

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14. It may be, that, due to the thoroughness of preliminary investigation in the classes of cases in question, Congress has believed that the Government's representatives needed no further warning of the result of subpoenaing a witness and examining him under oath.

SUPREME COURT OF THE UNITED STATES.

No. 248.—October Term, 1942.

The United States of America, Appellant, *vs.* William F. Monia and L. Aubrey Williams.	On Appeal from the District Court of the United States for the Northern District of Illinois.

[January 11, 1943.]

Mr. Justice Frankfurter, dissenting.

It is beyond dispute that the Constitution does not compel Congress to afford immunity from prosecution to those who testify without invoking the constitutional privilege against self-incrimination. The question for decision here is whether, by the Act of June 30, 1906, 34 Stat. 798, amending the immunity provision of the Act of February 25, 1903, 32 Stat. 904, Congress granted more than the Constitution requires and offered a "gratuity to crime", *Heike* v. *United States*, 227 U. S. 131, 142, by conferring immunity to persons who testify without claiming the protection of the privilege against self-incrimination and who in no way indicate that their testimony is being given in return for the statutory immunity. In other words, did Congress, by that amendment, seek to facilitate the enforcement of law by making "evidence available and compulsory that otherwise could not be got", *ibid.*, or was it passing an act of amnesty?

This question cannot be answered by closing our eyes to everything except the naked words of the Act of June 30, 1906. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage (see Amos, The Interpretation of Statutes, 5 Camb. L. J. 163; Davies, The Interpretation of Statutes, 35 Col. L. Rev. 519), to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. *E. g.*, *United States* v. *Fisher*, 2 Cranch 358, 385-86; *Boston Sand Co.* v. *United States*, 278 U. S. 41, 48; *United States* v. *American Trucking*

Plucknett, A Concise History of the Common Law, 2d ed., 294-300;

Ass'ns, 310 U. S. 534, 542-44. A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. And so we must turn to the history of federal immunity provisions.

The earliest federal statute dealing with immunity is the Act of January 24, 1857, 11 Stat. 155, as amended by the Act of January 24, 1862, 12 Stat. 333. This legislation, relating to testimony before either House of Congress, furnished a model for later immunity provisions. Congress was careful to state precisely what it was for which immunity was given: "No witness shall hereafter be allowed *to refuse to testify* to any fact or to produce any paper. . . . ." 11 Stat. 156 (italics added). It was the refusal to testify, not the refusal to appear as a witness, which Congress took away and for which it gave immunity.

Duty, not privilege, lies at the core of this problem—the duty to testify, and not the privilege that relieves of such duty. In the classic phrase of Lord Chancellor Hardwicke, "the public has a right to every man's evidence".[1] The duty to give testimony was qualified at common law by the privilege against self-incrimination. And the Fifth Amendment has embodied this privilege in our fundamental law. But the privilege is a privilege to withhold answers and not a privilege to limit the range of public inquiry. The Constitution does not forbid the asking of criminative questions. It provides only that a witness cannot be compelled to answer such questions unless "a full substitute" for the constitutional privilege is given. *Counselman* v. *Hitchcock*, 142 U. S. 547, 586. The compulsion which the privilege entitles a witness to resist is the compulsion to answer questions which he justifiably claims would tend to incriminate him. But the Constitution does not protect a refusal to obey a process. A subpoena is, of course, such a process, merely a summons to appear. 8 Wigmore on Evidence (3d ed.) p. 106, § 2199. There never has been a privilege to

[1] Debate in the House of Lords on the Bill to indemnify Evidence, 12 Hansard's Parliamentary History of England, 675, 693, May 25, 1742, quoted in 8 Wigmore on Evidence (3d ed.) p. 64, § 2192.

disregard the duty to which a subpoena calls. And when Congress turned to the device of immunity legislation, therefore, it did not provide a "substitute" for the performance of the universal duty to appear as a witness—it did not undertake to give something for nothing. It was the refusal to give incriminating testimony for which Congress bargained, and not the refusal to give any testimony. And it was only in exchange for self-incriminating testimony which "otherwise could not be got" (*Heike* v. *United States*, 227 U. S. 131, 142) because of the witness's invocation of his constitutional rights that Congress conferred immunity against the use of such testimony.

Instead of giving more than the constitutional equivalent for the privilege against self-incrimination, Congress for a long time did not give enough. See *Counselman* v. *Hitchcock*, 142 U. S. 547, invalidating the Act of February 25, 1868, 15 Stat. 37, R. S. § 860, the first immunity statute relating to judicial proceedings. In order to remove the gap between what this Act gave and what the Constitution was construed to require, Congress promptly passed the Act of February 11, 1893, 27 Stat. 443, in order not to interrupt the effective enforcement of the Interstate Commerce Act. As the debates reveal, Congress acted on its understanding of what this Court in the *Counselman* decision indicated was an adequate legislative alternative. See remarks of Senator Cullom, July 18, 1892, 23 Cong. Rec. 6333. The 1893 Act followed the language of the Act of January 24, 1857, by providing that "no person shall be *excused from attending and testifying* or from producing books . . . ." 27 Stat. 443 (italics added). And in 1896 this Court, in *Brown* v. *Walker*, 161 U. S. 591, 595, found that the 1893 Act "sufficiently satisfies the constitutional guarantee of protection". There was no indication of any belief that Congress had given anything more than it had to give—and, indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution required.

Certainly until the beginning of this century, therefore, Congress displayed no magnanimity to criminals by affording amnesty for their crimes. Indeed, so sensitive has Congress been against immunizing crime that it has not entrusted prosecutors generally with the power to relieve witnesses from prosecution in exchange for incriminating evidence against others. But as part of the legislative program for the correction of corporate abuses, Con-

gress in February 1903 included provisions for immunity in three additional measures, the Act of February 14, 1903, 32 Stat. 828, establishing the Department of Commerce and Labor and conferring upon the Commissioner of Corporations the investigatory powers possessed by the Interstate Commerce Commission, the Elkins Amendment of February 19, 1903, 32 Stat. 848, to the Interstate Commerce Act, and the Act of February 25, 1903, 32 Stat. 903-04, making large appropriations for the enforcement of the Interstate Commerce Act, the Sherman Law, and other enactments. It is this latter provision, as amended by the Act of 1906, which is immediately before us.

It was not until the startling decision of District Judge Humphrey in *United States* v. *Armour & Co.*, 142 Fed. 808, that the suggestion was seriously made that Congress, in studiously fashioning a constitutional equivalent for the privilege against self-incrimination, was playing Lady Bountiful to criminals. The particular concerns which the *Armour* opinion stirred must be heeded because they provoked the Act of 1906. The meaning of that legislation is lost unless derived from the circumstances which gave rise to it. The case arose out of a proceeding begun under the Act of February 14, 1903, 32 Stat. 825, creating the Department of Commerce and Labor. Section 8 of that Act provided that the Secretary of Commerce and Labor shall "from time to time make such special investigations and reports as he may be required to do by . . . either House of Congress". In obedience to a resolution of the House of Representatives, the Secretary directed the Commissioner of Corporations to investigate the causes of the low prices of beef cattle. Accordingly, the Commissioner instituted such an inquiry. At a conference with officers of the packing corporations and their counsel, the Commissioner explained the purposes and scope of his investigation. He informed them that he was acting independently and not in cooperation with the Department of Justice in its contemporaneous proceeding against the "Beef Trust" for alleged violations of the Sherman Law, and that any evidence obtained from the packers would not be given to the Department but would be reported only to the President for his appropriate use. (H. Doc. No. 706, 59th Cong., 1st Sess., p. 6.) Thereupon the Commissioner's agents were afforded an opportunity to examine the packers' books and papers.

Subsequently, an indictment under the Sherman Law was found against the packing corporations and their officers. Pleas in bar

were filed, alleging in substance that, as a result of the investigation made by the Commissioner of Corporations, the defendants had obtained immunity from prosecution for the offenses charged in the indictment. Judge Humphrey sustained these pleas as to the individual defendants on the ground that the information furnished by the defendants brought into operation the immunity provision of the Act of February 14, 1903, which incorporated by reference the Act of February 11, 1893, 27 Stat. 443, relating to testimony before the Interstate Commerce Commission. Judge Humphrey reached his conclusion by attributing to Congress in passing the Act of February 11, 1893, a purpose which this Court later unanimously rejected in *Heike* v. *United States*, 227 U. S. 131. For while Judge Humphrey correctly held that "the privilege of the amendment permits a refusal to answer", he also stated, quite incorrectly and without any warrant in the language, legislative history or policy of the Act, that the statute "wipes out the offense about which the witness might have refused to answer." 142 Fed. at 822. In other words, the district judge treated the immunity act as though it were an act of amnesty, and that is precisely what this Court in the *Heike* case said it was not: "Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute [the Act of February 25, 1903] is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443, which read 'No person shall be excused from attending and testifying,' &c. 'But no person shall be prosecuted,' &c., as now, thus showing the correlation between constitutional right and immunity by the form." 227 U. S. at 142.

Judge Humphrey doubtless fell into error because he treated the immunity provision as subsidiary to the main purpose, as he conceived it, of the Act establishing the Department of Commerce and Labor. He believed "the primary purpose" of that Act was to "secure information for the use of the legislative body". 142 Fed. at 826. It is plain that he did not view the immunity provi-

sions in their true light, that is, as means to facilitate the administration of the criminal law. Whatever justification Judge Humphrey may have had for entertaining such a notion with regard to the Act creating the Department of Commerce and Labor, it certainly has no application to the immunity provisions touching the Interstate Commerce Act and the Sherman Law. Those provisions were enacted as aids in the enforcement of criminal justice; they were not acts of amnesty designed to wipe out criminal offenses.

Acting swiftly to correct the error of the *Armour* decision, the President recommended that "the Congress pass a declaratory act" to set aside Judge Humphrey's misconception of congressional purpose. Message from the President of the United States, April 18, 1906, H. Doc. No. 706, 59th Cong., 1st Sess., p. 3. In so doing, President Theodore Roosevelt was acting upon the advice of Attorney General (soon to become Mr. Justice) Moody. Naturally enough, the declaratory legislation directed itself to the correction of the two evils that Judge Humphrey's opinion projected, namely, to make it clear that immunity should not be afforded for producing corporate documents which could in any event be had because the privilege against self-crimination is not available to corporations, *Wilson* v. *United States*, 221 U. S. 361, 372-74, and that a person who does not give evidence under the ordinary formalities incident to being a witness was not entitled to immunity. The legislation was responsive to the Government's position, as stated by Attorney General Moody: "Upon these facts [in the *Armour* case] the Government contended that the statutory immunity could be conferred only upon persons subpoenaed by the Commissioner of Corporations who might subsequently give testimony or evidence (in the legal sense of those terms) relating to the subject-matter of the indictment." H. Doc. No. 706, 59th Cong., 1st Sess., p. 7.

Such was the limited purpose of the 1906 amendment. Could it be that the President having proposed, and the Congress having enacted, a restrictive declaration regarding the scope of the immunity provision in order to prevent other courts from following the latitudinarian misconception of Judge Humphrey, the President and the Congress, both acting upon the advice of one of the ablest of Attorneys General, were unwittingly betrayed into introducing a new gratuity for witnesses under duty to respond to a subpoena, by giving an amnesty in exchange for the mere response?

For more than seventeen years thereafter it was unquestioned that Congress had given no more than the Constitution required—freedom from prosecution for evidence that could not otherwise be obtained, evidence that was withheld upon claim of constitutional privilege, evidence that was given only because Congress had provided immunity. This was the ruling of all the federal courts which considered the question, courts on which sat some of the ablest judges of their day—Judge Martin in *United States* v. *Heike*, 175 Fed. 852; Judge Grubb in *United States* v. *Skinner*, 218 Fed. 870; Judge Hunt in *United States* v. *Elton*, 222 Fed. 428; and Judge Rose in *Johnson* v. *United States*, 5 F. 2d 471. The narrow purpose of the 1906 amendment, in the light of the events which gave rise to it, was succinctly set forth by Judge Rose: "Quite clearly this act did only two things and it was intended to do no more. It made it clear that the immunity granted did not inure to the benefit of corporations and that a natural person could not claim it unless he had testified in obedience to a subpoena. It was passed to meet the serious situation which the President and Congress thought had been created by the rulings of Judge Humphrey. . . . It was clearly not intended to change the previously existing law in any other respect. . . . A construction should not be given to it which would result in a grand jury or prosecuting officer unwittingly conferring immunity upon a serious offender because in the best of good faith, and with no reason to suppose that he was criminally involved in the transaction, he was subpoenaed to produce some documents or to give some testimony which perhaps could just as well have been obtained from other sources. Unquestionably the witness has the constitutional right to object to testifying. Then it is open to the government to elect whether it will or will not proceed with his examination under the statute, but if it does not, his rights remain as they were before ~~471~~ he was called to the stand." Johnson v U.S. 5 Fed. 2d 471 477

The observations of Judge Grubb in *United States* v. *Skinner*, 218 Fed. 870, 879, are equally pertinent here: "The witness, in many cases, is alone informed as to whether his evidence will tend to incriminate him. The supposed incrimination may relate to offenses not under investigation by the examining tribunal, and of the existence of which or of the relation of the desired evidence to which the examining tribunal or the government law officer may have no knowledge. The Heike Case is an apt illustration of this possibility.

The witness is likely to have exclusive knowledge as to what facts and what answers may tend to his incrimination, and with reference to what offenses. Again, the witness alone knows whether he willingly gives his evidence for the purpose of exonerating himself, or only with the expectation of receiving immunity therefor. He is therefore in a better position to be called upon to assert his constitutional privilege than is the examining tribunal or the law officer of the government to call upon him to elect to do so. If any hardship attends the imposition of this burden on the witness, it has never been considered weighty enough to relieve him therefrom in exercising his constitutional privilege, prior to the immunity statutes. The immunity granted by the statute is a mere substitute for the constitutional safeguard, and has been held by the Supreme Court to be coterminous with it. There would seem, therefore, to be no reason for a different practice as to the assertion of the privilege where immunity is desired and where the constitutional privilege is insisted upon."

These decisions thus reflected weighty considerations of policy in finding that Congress afforded immunity from prosecution only to the extent that the Constitution required in exchange for a privilege and that Congress was not giving away indulgences.

These considerations of policy were certainly not answered in the opinion of the Texas district court which, in 1923, made the first departure from this uniform construction of the statute. The court held that immunity came merely because one testified in obedience to a subpoena, without any claim, either explicit or implied by the circumstances, that he had a constitutional right to refuse to answer on the ground that he might thereby be incriminated and that the testimony was being given only under compulsion of the immunity statute. *United States* v. *Pardue*, 294 Fed. 543. The court stated that its position was supported by the weight of authority, citing (1) the decision of Judge Humphrey in the *Armour* case. (2) *United States* v. *Swift*, 186 Fed. 1002, the opinion in which, so far as it is relevant to the question here, seems to point clearly the other way (see, especially, 186 Fed. at 1016-18); (3) *State* v. *Murphy*, 128 Wis. 201, which, much questioned originally, has been repudiated by the court which rendered it, *Carchidi* v. *State*, 187 Wis. 438, and *State* v. *Grosnickle*, 189 Wis. 17; and (4) a decision of the New York Court of Appeals, *People* v. *Sharp*, 107 N. Y. 427. In considering "the reasons which should control", the district court was "shocked by the

unconscionableness of the claim . . . that the government can under a statute which . . . grants general amnesty to persons who appear and testify in obedience to a subpoena, compel them to testify, and thereafter break faith with them by denying the protection of the statute to those who testify in exact accordance with its terms." 294 Fed. at 547. Starting with the misconception that the immunity provision was an act of amnesty and not a *quid pro quo* for the constitutional privilege, the District Court readily glided into question-begging by finding that there was a breach of faith in contesting the claim of amnesty.[2]

Once the confusion is avoided between an act of amnesty and an act which gives immunity in order "to make evidence available and compulsory that otherwise could not be got" because it could be withheld upon a claim of constitutional privilege, it becomes clear that a witness is not "entrapped" by requiring him to claim his constitutional privilege before affording him a substitute. A witness is no more entrapped by the requirement that he must stand upon his constitutional rights, if he desires their protection, when there is an immunity statute than he is where there is none at all. It is one thing to find that incriminating answers given by a witness were given because in the setting of the particular circumstances he would not have been allowed to withhold them. It is quite another to suggest that one who appears as a witness should, merely because his appearance is in obedience to a subpoena, thereby obtain immunity "on account of any transaction, matter or thing concerning which he may testify", even though the incrimination may relate to a transaction wholly foreign to the inquiry in which the testimony is given and even though the most alert and conscientious prosecutor would not have the slightest inkling that the testimony led to a trail of self-crimination. Such a construction makes of the immunity statute not what its history clearly reveals it to be, namely, a carefully devised instrument for the achievement of criminal justice, but a measure for the gratuitous relief of criminals. The statute reflects the judgment of Congress that "the public has a right to every man's evidence".

[2] It is significant that the *Heike* case, in which this Court held there was "no reason for supposing that the [immunity] act offered a gratuity to crime", 227 U. S. at 142, was cited neither by the court below in this case, nor by Judge Hutcheson in the *Pardue* case, 294 Fed. 543, nor in any of the cases following the *Pardue* ruling, United States v. Ward, 295 Fed. 576, United States v. Moore, 15 F. 2d 593, and United States v. Goldman, 28 F. 2d 424.

It is not for us to relax the demands of society upon its citizens to appear in proceedings to enforce laws enacted for the public good.

Beginning with the Securities Act of 1933, 48 Stat. 87, Congress has enacted no less than seventeen regulatory measures which contain provisions for immunity from prosecution in exchange for self-incriminating testimony. Of these fourteen, including *inter alia* the Securities Exchange Act of 1934, 48 Stat. 900, the National Labor Relations Act, 49 Stat. 456, the Communications Act of 1934, 48 Stat. 1097, the Public Utility Holding Company Act of 1935, 49 Stat. 832, the Federal Power Act, 49 Stat. 858, and the Civil Aeronautics Act of 1938, 52 Stat. 1022, confer immunity when a person testifies under compulsion "after having claimed his privilege against self-incrimination". Three of these statutes, however, the Motor Carrier Act of 1935, 49 Stat. 550, the Industrial Alcohol Act, 49 Stat. 875, and the Fair Labor Standards Act of 1938, 52 Stat. 1065, do not contain this additional clause—they merely follow the old form customarily used by Congress prior to the Securities Act of 1933. Of course, there is a difference in the language of these statutory provisions. But the process of construing a statute cannot end with noting literary differences. The task is one of finding meaning; and a difference in words is not necessarily a difference in the meaning they carry. The question is not whether these provisions are different, but whether there is significance in the difference. If the difference in language reflected a difference in the scope of the immunity given, or in the nature of the considerations that moved Congress to make a differentiation, there would surely be some indication, however faint, somewhere in the legislative history of these enactments that some legislator was aware that the difference in language had significance. But there is none.

If Congress saw fit gratuitously to confer immunity to citizens who appear as witnesses in proceedings to enforce the Motor Carrier Act of August 9, 1935, it is hard to understand why it should give such immunity only to those who after asserting their privilege, were pressed to give evidence in proceedings to enforce the Federal Power Act of August 26, 1935, and in proceedings to enforce the Public Utility Holding Company Act which became law the same day, and again should have given the privilege gratuitously in the Industrial Alcohol Act, which became law the following day. The Railroad Unemployment Insurance Act, 52 Stat. 1107, and the Fair Labor Standards Act of 1938, 52 Stat. 1065, both became law the

same day, June 25, 1938. Yet the immunity provision of the former contains the "after having claimed, etc." clause, and that of the latter does not. It is only fair to Congress to assume that if there was a purpose to make a difference in the demands upon citizens when they appear as witnesses under one statute rather than the other, that purpose would have been stated somewhere in the course of the legislative history. But there is a total absence of any indication anywhere that any Congressman had any notion that the enforcement of the Motor Carrier Act of 1935, the Industrial Alcohol Act, or the Fair Labor Standards Act of 1938, called for a different treatment of witnesses in proceedings under these Acts than in enforcement proceedings under the other fourteen Acts. The explanation seems obvious. There are no expressions in the legislative materials to indicate that the legislative purpose varied in this respect between these Acts because there was no difference in purpose.

But the variations in the phraseology employed in the Acts are not to be explained away as just caprices of a single draftsman. The explanation is likely to be found in the manner in which Congress usually acts in adopting regulatory legislation. If a single draftsman had drafted each of these provisions in all seventeen statutes, there might be some reason for believing that the difference in language reflected a difference in meaning. But it is common knowledge that these measures are frequently drawn, at least in the first instance, by specialists (perhaps connected with interested government departments) in the various fields. Provisions in different measures dealing with the same procedural problem not unnaturally, therefore, lack uniformity of phrasing.

We do not have to look very far in order to see how Congress happened to use one form of immunity provision in some of these statutes and another form in others. Consider the evolution of the three statutes which followed the old, pre-1933 form. The Motor Carrier Act of 1935 was enacted as an amendment to the Interstate Commerce Act. What was more natural than that the enforcement provisions of the old Act should be incorporated by reference in providing for the new powers of the Commission. §§ 201, 205e, 49 Stat. 543, 550. And the Industrial Alcohol Act of 1935, so far as its enforcement provisions were concerned, was patterned upon its predecessor, the National Prohibition Act of 1919, 41 Stat. 317, and the draftsman naturally took the immunity provision from that statute.

The Fair Labor Standards Act of 1938 has a more complicated but even more revealing history. Introduced first in the Senate

on May 24, 1937, it carried the explicit provision that a person gains immunity "after having claimed his privilege against self-incrimination". It remained in this form throughout the course of the legislation in both the House and the Senate for nearly a year, when the whole conception of the bill was changed. Everything was struck out after the enacting clause, and the new measure was submitted to the House on April 21, 1938. As part of that new bill, the provision for the attendance of witnesses in the enforcement of the Act simply incorporated by reference the provision of the Federal Trade Commission Act—and obviously this was because the draftsmen of the new bill drew heavily upon the the scheme of that Act. But there is an utter want of evidence to support the suggestion that after a year the proponents of this legislation and the committees that grappled with its problems changed their minds as to the extent of the immunity to be afforded to witnesses summoned in proceedings under the Act. Nor is there any evidence in the debates that when Congress finally passed the measure in its present form, it meant to give a greater immunity than that which was provided in the various bills that were before the Senate and the House for a year.

The course taken by the Securities Act of 1933 before it was finally enacted is revealing as to the significance of its immunity provision, the first to depart from the old form. Up to the time that the bills which eventually became the Act emerged from conference, the immunity provision followed the old form. The new formula appears for the first time in the bill reported by the conference. But neither in the conference report nor elsewhere is there any suggestion that the introduction of this phrase imported any new legislative purpose or that it was anything more than a careful rephrasing of a conventional statutory provision. In the case of the Fair Labor Standards Act, as we have seen, the more meticulous phrase, "after having claimed his privilege against self-incrimination", was in all successive bills in both the House and the Senate but it disappeared at the final stage of the enactment of the measure. No one ever suggested, so far as the available materials show, that the change in the formula implied any change as to the intended scope of the immunity provision. Style, not substance, is obviously the explanation. In the case of one statute Congress began with the new form and ended with the old one; in the case of the other it began with the old one and ended with the new. Upon what rational basis can we attribute to Congress an

intention to make the scope of the immunity provision of the one statute vitally different from that of the other?

To attribute caprice to Congress is not to respect its rational purpose when, as here, we find a uniform policy deeply rooted in history even though variously phrased but always directed to the same end of meeting the same constitutional requirement.

I am therefore of opinion that an appearance in response to a subpoena does not of itself confer immunity from prosecution for anything that a witness so responding may testify. There must be conscious surrender of the privilege of silence in the course of a testimonial inquiry. Of course no form of words is necessary to claim one's privilege. Circumstances may establish such a claim. But there must be some manifestation of surrender of the privilege. The prosecutor's insistence upon disclosure which, but for immunity from prosecution, could be withheld is that for which alone the immunity is given. History and reason alike reject the notion that immunity from prosecution is to be squandered by giving it gratuitously for responding to the duty, owed by everyone, to appear when summoned as a witness.

Since the demurrers to the pleas should have been ~~overruled~~ sustained, the case should be remanded to the district court for appropriate disposition in accordance with the views herein expressed.

Mr. Justice DOUGLAS joins in this dissent.